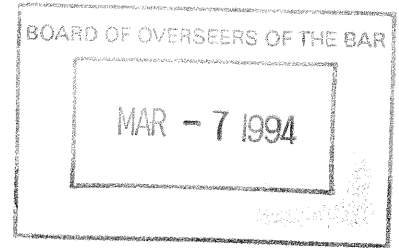


STATE OF MAINE



BEFORE THE GRIEVANCE COMMISSION:

GRIEVANCE COMM.
FILE NO. 92-G-22

BOARD OF OVERSEERS OF THE BAR,)
PETITIONER)

vs.)

JAMES B. SMITH,)
RESPONDENT)

REPORT OF FINDINGS &
CONCLUSIONS OF PANEL E
OF THE GRIEVANCE
COMMISSION

On February 1, 1994, in the Cumberland County Courthouse in Portland, Maine, pursuant to due notice, Panel E of the Grievance Commission conducted a disciplinary hearing open to the public according to Maine Bar Rule 7.1(e), to determine whether grounds existed for the issuance of a reprimand or whether probable cause existed for the filing of an information with respect to alleged professional misconduct of Respondent James B. Smith, Esq. as described in the petition dated October 20, 1993, filed by Bar Counsel of the Board of Overseers of the Bar.

The Board of Overseers of the Bar was represented by Assistant Bar Counsel, Geoffrey S. Welsh. Respondent appeared on his own behalf. An Answer to the Petition had been duly filed by Respondent. The hearing was stenographically recorded.

Evidence with respect to the Petition was presented and consisted of the testimony of Joseph A. Delano, Assistant District Attorney Megan Elam, and Respondent. Board Exhibits 1 through 10 were admitted into evidence without objection. At the conclusion of testimony, the Panel heard brief summary argument from Bar Counsel and Respondent.

FINDINGS OF FACT

Respondent was at all times relevant hereto, an attorney duly admitted to and engaging in the practice of law in the State of Maine, and is subject to the Maine Bar Rules.

1. MaryLou Ricci and Joseph A. Delano were divorced in April of 1986 and custody of their three children was granted to Ms. Ricci with reasonable visitation rights granted to Mr. Delano.

2. In early 1987, Ms. Ricci accused Mr. Delano of having sexually abused their three children. She filed a Protection from Abuse complaint against Mr. Delano and a temporary order was issued on February 20, 1987.

3. After filing the Protection from Abuse Complaint, Ms. Ricci retained Respondent to represent her in that matter and also in connection with post divorce disputes over child custody and visitation.

4. On May 20, 1987, Mr. Delano filed a Motion to Enforce his visitation rights, which motion stated, "Because Plaintiff (Ms. Ricci) threatened criminal action against Defendant (Mr. Delano) ... Defendant voluntarily agreed not to press visitation See Board Exhibit #3, paragraph 5. On October 23, 1987, the Court entered an order concerning the issues of custody and visitation.

5. Respondent heard nothing more from Ms. Ricci until late February or early March, 1990, at which time she asked Respondent to contact Mr. Delano to see if he would be willing to settle everything by terminating his parental rights to the children.

6. After obtaining the permission of Mr. Delano's former attorney, Respondent wrote a letter to Mr. Delano dated March 20, 1990. See Board Exhibit #5. In that letter Respondent stated that he wanted to discuss settling all the civil and criminal matters then in dispute between Ms. Ricci and Mr. Delano and that resolving those issues would involve the termination of Mr. Delano's parental rights and responsibilities to the three children.

7. In the second paragraph of that letter Respondent went on to say:

If I do not hear from you, it is my understanding that MaryLou

(Ricci) intends to proceed with the criminal allegations that have been made against you and no doubt she will petition the Court to terminate your parental rights.

8. In 1987 the Cumberland County District Attorney's Office began investigating Ms. Ricci's complaints of child abuse by Mr. Delano, but it was not until January 8, 1993, an indictment was returned against Mr. Delano on those charges.

9. On March 30, 1993 the State of Maine filed a Motion to File the case due to Mr. Delano's agreement to supervised visitation and counseling. Upon successful completion of those conditions, the criminal case was to be dismissed after a period of six months.

CONCLUSIONS

The Board of Overseers has charged that Respondent violated Maine Bar Rule 3.6(c), Threatening Prosecution. The rationale underlying rules such as 3.6(c) is set forth in the Comment section of the American Bar Foundation's Annotated Code of Professional Responsibility:

The criminal process, which is designed to protect society as a whole, is undermined when it is used to force settlement of private claims or controversies: the criminal process will be subverted by such misuse, and the person against whom it is misused is likely to be deterred from asserting his or her legal rights, which is contrary to the purpose of the civil process that is created for the settling of private disputes. At 343,(1979).

Respondent asserts that neither he nor his client intended to threaten prosecution, and that he does not believe the language in his March 20, 1990 letter constitutes a threat. Mr. Delano testified that he definitely felt threatened by the statements contained in that letter.

Given the highly charged context within which the letter was sent and received, i.e., the sexual abuse charges and the potential action to terminate parental rights, and the fact that Ms. Ricci had actually complained to the police, this panel concludes that the language in the last sentence of the letter can only be interpreted as a threat within the meaning of the rule. The clear suggestion of a trade-off of civil rights in order to avoid criminal sanctions is present. This conclusion is particularly inescapable here because Respondent had earlier seen post divorce pleadings which clearly set forth an allegation of threatened criminal action which successfully impacted a civil case.

Although the panel accepts Respondent's position that he did not personally promote the use of the criminal process, and, in fact stayed clear of it, and that it was his client who first linked the criminal and civil actions, the panel does not accept Respondent's claim that he merely conveyed his client's settlement proposal. The first paragraph of Respondent's letter did convey settlement information to Mr. Delano. However, the last sentence in the second paragraph was not innocently duplicative as asserted by Respondent but rather set forth the "quid pro quo", with no purpose other than to obtain an advantage in a civil matter.

In an Opinion by Maine's Professional Ethics Commission of the Board of Overseers of the Bar dealing with negotiations surrounding a malpractice claim and the filing of a grievance complaint, it was noted:

Indeed, any mention of the possibility of filing a grievance made in the course of the negotiations concerning the malpractice claim would be suspect if it conveyed a subtle inference that a trade-off might be possible. Opinion No. 100, Maine Manual on Professional Responsibility. Issue O-340(1989). (Emphasis added).

Two other issues were considered by the panel: 1) whether conveying a client's threat, rather than an attorney's own threat, falls within the rule; and 2) whether the rule encompasses a threat to proceed with a pending prosecution as well as a threat to "present" charges. Both questions are answered in the affirmative. In this case the panel sees no reason to make a distinction between an attorney's personal threat to take action and the conveyance of a client's threat to do so. See In re John E. Charles, 618 P.2nd 1281 (Oregon 1980) and Homer L. Burrell vs. Disciplinary Board of the Alaska Bar Association, 777 P.2nd 1140 (1989).

Because the same policy considerations apply to threatening to present criminal charges and threatening to proceed with a dormant criminal action, this panel finds that Respondent's language falls within the intent of Rule 3.6(c).


Public confidence in our system of justice is undermined when attorneys contribute to, or do not correct, misperceptions that criminal prosecutions are within the control of private citizens. This is especially true in a case such as the one before us when an attorney is dealing with an unrepresented party who does not have a professional to explain the system to him.

This panel concludes that Respondent has violated Maine Bar Rule 3.6(c) because he participated in a threat involving criminal prosecution

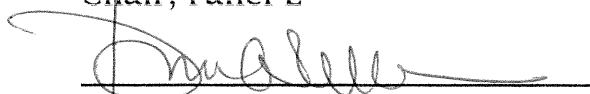
solely to obtain an advantage in a civil matter. Although the panel does not believe there is a likelihood that this particular violation will be repeated by this Respondent, it does find that the potential for significant injury to the legal system in this type of case warrants a reprimand.

Consequently, for violating Maine Bar Rule 3.6(c) Respondent is hereby reprimanded and Bar Counsel is hereby directed to notify Respondent of the reprimand by furnishing a copy of this report.

DATED: MAY 03, 1994



Gerald F. Petruccelli
Chair, Panel E



Donald A. Leeber


Kathryn Monahan Ainsworth, Esquire